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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

NATHAN BLOOMBERG,

Petitioner,

—against—

FRANK RADICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS

JACOB W. FRIEDMAN,
Attorney for Petitioner.

ISADORE GLAUBERMAN,
of Counsel.

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IN THE

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OCTOBER TERM, 1947

NATHAN BLOOMBERG,

Petitioner,

—against—

FRANK RADICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Nathan Bloomberg respectfully prays for a writ of certiorari to the New Jersey Court of Errors and Appeals to review a judgment of that Court entered on June 27, 1947, reversing an order of the Court of Chancery of the State of New Jersey, which denied a motion to dismiss a petition of the petitioner to open a final decree in a foreclosure suit entered against him while he was in the military forces of the United States.

Statement of Matters Involved

Petitioner was in the military service of the United States from June 3, 1942, to October 30, 1945 (2).* On or about April 22, 1943, a bill of complaint was filed by respondent in

* Numerical references relate to pages of the state of case.

the Court of Chancery of New Jersey to foreclose a mortgage on certain premises located in the Borough of Cliffside in Bergen County, State of New Jersey, and named petitioner as one of the defendants (19). On November 29, 1943, a final decree was entered directing that the mortgaged premises be sold and that the defendants in the foreclosure suit, including the respondent, be debarred and foreclosed of all equity of redemption therein (29-31). During the time the foreclosure suit was in progress the petitioner was stationed overseas (2). On January 30, 1946, after petitioner was discharged from military service, he filed a petition with the Court of Chancery of the State of New Jersey to have the foreclosure proceedings reopened, to the end that he might be permitted to answer the bill of complaint, setting up his defenses (1-3). A motion was made by respondent to dismiss the petition on the ground that it was not filed within ninety days of petitioner's separation from the military service and that it did not show that by reason of his military service petitioner was prejudiced in making his defense or that he had a meritorious and legal defense to the action (11-12). The Court of Chancery denied the motion and held that under Sections 525 and 532 of the Soldiers' and Sailors' Civil Relief Act (50 U. S. C. A. App.), petitioner was entitled to make the application to open the decree and an order was entered opening the interlocutory decree and the final decree as to the petitioner alone and granting him twenty days in which to answer the bill of complaint (13-15).

On appeal, the New Jersey Court of Errors and Appeals reversed the Court of Chancery and decided that the petitioner's petition should have been dismissed on the ground that it did not appear from the petition that he was prejudiced in making his defense, or that he had a legal and meritorious defense to the suit, nor did it appear that he was diligent in pursuit of his remedy.

Question Presented

Was petitioner entitled to have the foreclosure proceedings reopened under the Federal Soldiers' and Sailors' Civil Relief Act, where the proceedings were commenced and concluded while he was overseas, and resulted in the sale of the property and the barring of the right of redemption?

Reasons for Allowance of the Writ

The New Jersey Court of Errors and Appeals erroneously construed Section 532 of the Soldiers' and Sailors' Civil Relief Act of 1940 as applying only in cases where a discharged veteran could show that by reason of his military service he was prejudiced in the foreclosure suit or that he had a meritorious and legal defense to the action. It erroneously applied the provisions of Section 520 of the Act to foreclosure suits, which are governed only by Section 532. Furthermore, the decision of the New Jersey Court of Errors and Appeals also failed to give effect to Section 525 of the Soldiers' and Sailors' Civil Relief Act of 1940, which entitled the petitioner to have the decree opened for the purpose of redeeming the property. The New Jersey Court of Errors and Appeals erred in holding that the petitioner was not diligent in pursuing his remedy under the Act.

Wherefore your petitioner prays that a writ of certiorari issue to the New Jersey Court of Errors and Appeals, commanding said Court to certify and send to this Court, on a date to be designated, transcript of the record of all proceedings of said New Jersey Court of Errors and Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment and order

of the New Jersey Court of Errors and Appeals be reversed and that petitioner be granted such other, further and different relief as may seem proper.

Dated: New York, August 29, 1947.

NATHAN BLOOMBERG

By: JACOB W. FRIEDMAN
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

NATHAN BLOOMBERG,

Petitioner,

—against—

FRANK RADICH,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

Hon. Charles M. Egan, Vice Chancellor, filed a memorandum granting the petitioner's prayer for relief to the extent of opening the final decree. The opinion was officially reported and is printed in the state of the case (13-15). The Court of Errors and Appeals reversed the Court of Chancery in an opinion written by Judge McLean, which is printed in the appendix.

Jurisdiction

The jurisdiction of the Supreme Court is invoked under Section 237 of the Judicial Code as amended, otherwise known as 28 U. S. C., Section 344, subdivision (a).

Statutes Involved

Section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, also known as Section 525 of title 50 U. S. C. A. App., provides as follows:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 (Oct. 6, 1942) be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax or assessment."

Section 302 of the Soldiers' and Sailors' Civil Relief Act of 1940, also known as Section 532, 50 U. S. C. A. App., provides as follows:

"MORTGAGES, TRUST DEEDS, ETC.

"(1) The provisions of this section shall apply only to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him which obligations originated prior to such person's period of military service.

* * * * *

"(3) No sale, foreclosure, or seizure of property for nonpayment of any sum due under any such obligation, or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 (Oct. 6, 1942) and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in Section 107 (Section 517 of this Appendix), unless upon an order previously granted by the court and a return thereto made and approved by the court.

"(4) Any person who shall knowingly cause to be made any sale, foreclosure, or seizure of property, defined as invalid by subsection (3) hereof, or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both . . . "

Section 200 of the Soldiers' and Sailors' Civil Relief Act of 1940, also known as Section 520 of 50 U. S. C. A. App., provides as follows:

"(3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts.

"(4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment."

Statement of the Case

A summary statement of the case is set forth in the petition.

Specification of Errors to Be Urged

1. The Court below erroneously applied the provisions of Section 520 of the Soldiers' and Sailors' Civil Relief Act of 1940 to foreclosure suits, which are governed by Section 532.

2. The Court below failed to give effect to Section 525 of the Soldiers' and Sailors Civil Relief Act, which entitled the petitioner to have the decree opened for the purpose of redeeming the property.

3. The Court below erroneously construed Section 532 of the Soldiers' and Sailors' Civil Relief Act as placing the burden on the petitioner to prove in his petition that his ability to prosecute or defend the foreclosure suit was materially impaired by reason of his military service.

4. The Court below erroneously held that petitioner was not diligent in pursuing his remedy under the Soldiers' and Sailors' Civil Relief Act, where he applied to the Court for relief three months after his discharge.

ARGUMENT

I

The Court below erroneously applied the provisions of Section 520 of the Soldiers' and Sailors' Relief Act of 1940 to foreclosure suits, which are governed by Section 532.

The foreclosure proceedings were commenced and the final decree entered while petitioner was in military service and overseas. Under the circumstances the petitioner was entitled to the protection given him by the Soldiers' and Sailors Civil Relief Act of 1940. Section 532 of that Act, 50 U. S. C. A. App. so far as pertinent, has been quoted above (p.).

It is clear from those provisions that the sale in the foreclosure proceeding was invalid as against the petitioner. The violation of that section was made a crime and punishable. Petitioner was therefore within his rights after his discharge from military service in applying to the Court of Chancery to vacate the final decree, which on its face was invalid as to him. He filed his petition in the Court within three months after his discharge.

The Court below in reversing the Court of Chancery, stated: "At any time during his service or within ninety days of his discharge, he could have applied to have the foreclosure decree reopened." The Court obviously applied Section 520 of the Act, which deals with default judgments and has no application to foreclosure suits, which are governed solely by the provisions of Section 532. Section 520 deals with general actions or proceedings and not with secured debts, which are governed by Section 532. Although a solicitor was appointed by the Court, who notified the petitioner of the foreclosure proceeding, that fact did not permit the sale in the foreclosure proceeding prohibited by Section 532. There is no provision in Section 532 for the appointment of solicitors in order to permit a foreclosure proceeding against a person in military service. The provisions in Section 520 for the appointment of an attorney to represent a defendant who is in military service has no application to foreclosure proceedings. The provisions of Section 532 governing mortgages and trust deeds are clear that no sale or foreclosure was to take place "during the period of military service or within three months thereafter." The Court below therefore erred in applying the provisions of Section 520 instead of the provisions of Section 532 of the Act, in determining whether the petitioner had a right to have the foreclosure proceedings reopened.

II

The Court below failed to give effect to Section 525 of the Soldiers' and Sailors' Civil Relief Act, which entitled the petitioner to have the decree opened for the purpose of redeeming the property.

The final decree in the foreclosure suit dated November 29, 1943, not only ordered the sale of the property, but also barred the equity of redemption which petitioner had in the property (31).

Petitioner was entitled to redeem the property under Section 525 of the Act, 50 U. S. C. A. App., which is quoted above (p. 5-6).

It was to prevent the barring of the equity of redemption of soldiers and sailors whether as a result of a statute or a proceeding in a court that the above section was enacted. *Illinois* v. *Gwinn,* 390 Ill. 345, 61 N. E. 2d, 249, 254-255. *United States* v. *Alberts,* 59 Fed. Supp. 298.

Under the New Jersey law the right of redemption by the owner of property is extinguished by decree of foreclosure and when the sale is confirmed. *Union Building & Loan Assn. of Camden* v. *Childrey,* 97 N. J. Eq. 20; *Atwood* v. *Carmer,* 75 N. J. Eq. 319; *Wimpfheimer* v. *Prudential Ins. Co.,* 56 N. J. Eq. 585.

In order to exercise his right of redemption, petitioner had to apply to have the final decree, which barred his right, opened. The decision of the Court below in denying him the right to have the final decree reopened, failed to give effect to Section 525 of the Act.

III

The Court below erroneously construed Section 532 of the Soldiers' and Sailors' Civil Relief Act as placing the burden on the petitioner to prove in his petition that his ability to prosecute or defend the foreclosure suit was materially impaired by reason of his military service.

The recital in the petition that the petitioner was in the military service of the United States during the time the foreclosure suit was in progress and that he was stationed overseas, was prima facie evidence that petitioner's ability to defend the suit or protect his rights was materially impaired. *Bowery Sav. Bank* v. *Pellegrino,* 185 Misc. 912, 58 N. Y. S. 2d 771. The Court below, however, took the view that the burden was on the petitioner to set forth in his petition that his rights were impaired as a result of his military service, for the Court stated:

> "Respondent (petitioner) does not make it appear that by reason of his military service he was prejudiced in making his defense or that he has a legal and meritorious defense to the suit or any part thereof, nor does it appear that he was diligent in pursuit of his remedy."

The law, however, has been well established that the burden of proof is on the creditor who claims that the absence of the debtor in military service did not materially impair his ability to defend himself. *Boone* v. *Lightner,* 319 U. S. 561; *Bowsman* v. *Peterson,* 45 Fed. Supp. 741; *Reynolds* v. *Haulcroft* (Ark.), 170 S. W. 2d, 678; *Gates* v. *Gates* (Ga.), 28 S. E. 2d 108; *Meyers* v. *Schmidt,* 181 Misc. 589, 46 N. Y. S. 2d 420.

No proof was ever submitted by the plaintiff mortgagee in the foreclosure suit that petitioner's absence in military service did not materially impair his ability to defend himself.

It is therefore respectfully submitted that the Court below was in error in holding that the burden was on the petitioner to set forth in his petition facts showing that his ability to prosecute or defend the foreclosure suit was materially impaired by reason of his military service.

IV

The Court below erroneously held that petitioner was not diligent in pursuing his remedy under the Soldiers' and Sailors' Civil Relief Act, where he applied to the Court for relief three months after his discharge.

The foreclosure proceedings were concluded on November 29, 1943 (29-31). Petitioner was discharged from military service on October 30, 1945 (2). He filed his petition to open the decree on January 30, 1946, exactly three months after his discharge. The Court below erroneously assumed that petitioner was limited in making his application either to ninety days, as provided in Section 520, or to three months, under Section 532, for the Court stated in its opinion:

> "... At any time during his service or within ninety days of his discharge, he could have applied to have the foreclosure decree reopened. It was not until the last day of the three months' limitation under Section 532 supra, more than two years after he had notice of the suit, that his petition was filed, or that he took any steps to avail himself of the remedies provided."

It is submitted that there is no such limitation in Section 532, and as already shown, the provisions of Section 520 have no application to foreclosure suits. Under Section 532, no sale in foreclosure could be had "during the period of military service or within three months thereafter." The foreclosure proceedings having taken place while petitioner was in military service they were not binding on him. The Court below in holding that because petitioner filed his application on the last day of the third month after his discharge, he was therefore not "diligent in pursuit of his remedy", adopted an erroneous interpretation of the statute. The Soldiers' and Sailors' Civil Relief Act was enacted for the purpose stated in the Act (Sec. 510 U. S. C. A. App.), "in order to enable such persons to devote their entire energy to the defense needs of the nation." The Act, therefore, should be construed in favor of the petitioner. As was stated by this Court in *Boone* v. *Lightner,* 319 U. S. 561:

> "The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial . . . "

CONCLUSION

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.

ISADORE GLAUBERMAN,
of Counsel.

APPENDIX

NEW JERSEY COURT OF ERRORS AND APPEALS

No. 219 February Term 1947.

FRANK RADICH,

Complainant-Appellant,

—VS.—

MORRIS BLOOMBERG, *et al.*,

Defendants-Respondents.

Opinion Below

Submitted February Term 1947: Decided June 27, 1947.

Appeal from the Court of Chancery.

For Complainant-Appellant, Milton T. Lasher.

For Defendants-Respondents, Isadore Glauberman.

The opinion of the Court was delivered by MCLEAN, *J.*

This appeal brings before the Court for review, Orders of the Court of Chancery under the Soldiers' and Sailors' Civil Relief Act of 1940, Title 50, U. S. C. App. Section 501, etc.

Respondent, Nathan Bloomberg, was the owner of an undivided one-third part of premises in the Borough of Cliffside, Bergen County. Appellant, Frank Radich filed his bill to foreclose a mortgage on the premises. During the time the foreclosure suit was in progress, Respondent was in

the Military Forces of the United States. A final decree was entered November 28, 1943. The premises were sold to Appellant and the sale was duly confirmed. Respondent was discharged from Military Service October 30, 1945 and on January 30, 1946 filed a petition with the Court of Chancery to have the foreclosure proceedings reopened to the end that he might be permitted to answer the bill of complaint setting up his defenses.

Appellant moved to dismiss the petition on the ground that it was not filed within 90 days of the Respondent's separation from Military Service; that it did not show that by reason of his military service Respondent was prejudiced in making his defense; or that he had a meritorious and legal defense to the action or some part thereof, as required by Section 520, of the Act. The Court below denied the motion and held that under Sections 525 and 532 of Title 50, Respondent was entitled to make application to open the decree during the period of his Military Service or three months thereafter, and an order was entered opening the interlocutory decree and the final decree as to Respondent alone and granting him 20 days in which to answer the bill of complaint. This appeal is from the order denying the motion to dismiss the petition and the orders opening the interlocutory and final decrees. We conclude that Respondent's petition should have been dismissed.

The Soldiers' and Sailors' Civil Relief Act, *supra,* was intended to give members of the Armed Forces a degree of mental repose, protect their rights and remedies and free them from hardships that might be imposed solely because of the performance of their duties. It is to be administered as an instrument to accomplish substantial justice which requires an equitable consideration of the rights of both parties to the end that their respective interests may be properly conserved. It is not to be used as an instrument

to obtain indefinite delay. *Franklin Society for Home Building and Savings* vs. *Flavim et al.* 40 N. Y. S. 2nd 582, 265 Appl. Div. 720, Aff'd. 291 N. Y. 530, Certiorari denied 320 U. S. 786; *New York Life Insurance Co.* vs. *Litke et al,* 45 N. Y. S. 2nd 576; *Meyers* vs. *Schmidt,* 46 N. Y. S. 2nd, 420; *The Sylph,* 42 Fed. Supp. 354.

The application of provisions of the Act authorizing relief against immediate imposition of burdens of an obligation incurred prior to commencement of military service, is not authorized by merely showing that applicant is or had been in the military service, but there must be proof and the Court must be of the opinion that serviceman's ability to comply with terms of his obligation has been materially affected by military service. *New York Life Insurance Co.* vs. *Litke, supra.*

Under the comparable Act of 1918, it was held while the courts will protect the men engaged in the service of the nation from loss in legal proceedings brought about by absence in service, the papers should show that the threatened injury is due to their service and consequent inability to protect their interest and this is the plain direction of the Act of Congress, *Eietz* vs. *Trempel,* 170 N. Y. S. 108.

Respondent relies particularly on Section 532 *supra* which provides that "no sale or foreclosure shall be valid * * * unless upon order previously granted by the Court and a return thereto made and approved by the Court." Foreclosure proceedings have been considered a sufficient compliance with this proviso. Cases above cited and *Ninth Federal Loan Association of New York City* vs. *Radding,* 48 N. Y. S. 2nd 762. This suit was brought in the New York State Courts to foreclose a mortgage against property owned by Jason D. Radding. Radding at the time the foreclosure was begun, was serving in the military forces. He moved for a stay on the ground of his military service. The

motion was denied because of his failure to show that he had a defense.

Radding then brought a suit in the United States District Court for the Southern District of New York against the plaintiff in the above suit to obtain a stay of further proceedings in the State Court and for an order or judgment setting aside the State Court's foreclosure sale if it had taken place. The motion was denied and the complaint dismissed. It was held that the New York State Court's foreclosure decree, notwithstanding mortgagee's application for relief under the Soldiers' and Sailors' Relief Act, Section 532, *supra,* was *res adjudicata* in the Federal Court of the Mortgagee's right under the Act. *Radding* vs. *Ninth Federal Savings and Loan Association,* 55 Fed. Supp. 361.

Respondent had notice of the foreclosure suit and his interests were adequately protected. Subpoena was issued and returned *non est* followed by substituted service by the publication and mailing of the required notice. Solicitor was appointed to protect his interests and appears to have been faithful in his service. Respondent was in direct contact with him by mail, but took no interest in the proceedings. The foreclosure proceedings were concluded on November 20, 1943. Respondent was discharged from military service on October 30, 1945. At any time during his service or within ninety days of his discharge, he could have applied to have the foreclosure decree reopened. It was not until the last day of the three months' limitation under Section 532 *supra,* more than two years after he had notice of the suit, that his petition was filed, or that he took any steps to avail himself of the remedies provided.

Respondent does not make it appear that by reason of his military service he was prejudiced in making his defense or that he has a legal and meritorious defense to the

suit or any part thereof, nor does it appear that he was diligent in pursuit of his remedy.

The orders below will be reversed and the cause remanded to the Court of Chancery, with instructions to dismiss the petition.

"ENDORSED
Filed—June 27, 1947
LLOYD B. MARSH
Clerk."

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OCTOBER TERM, 1947.

No. 348.

NATHAN BLOOMBERG,

Petitioner,

against

FRANK RADICH,

Respondent.

On Petition for Writ of Certiorari to the New Jersey Court of Errors and Appeals.

BRIEF OF RESPONDENT.

MILTON T. LASHER,
Attorney for and of Counsel with Respondent,
14 Washington Place,
Hackensack, N. J.

Jersey Law Print, 78 Montgomery Street, Jersey City, N. J. - Telephone: BErgen 4-1589

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POINT I.

No right to open the decrees herein can be based upon the Soldiers' and Sailors' Relief Act of 1940 because petitioner, Nathan Bloomberg, did not comply with the terms of that Act. 3

POINT II.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NATHAN BLOOMBERG,

Petitioner,

VS.

FRANK RADICH,

Respondent.

BRIEF FOR RESPONDENT.

Opinion Below.

The opinion of the New Jersey Court of Errors and Appeals is printed in the appendix of the petitioner's brief at page 19 and is reported in 140 N. J. Equity reports at page 289, 54 A. 2d 247. This opinion reversed the orders under review made by the Hon. Charles M. Egan, Vice-Chancellor, which orders had permitted the opening of the final decree in foreclosure proceedings theretofore instituted by the respondent in which the petitioner herein was named one of the party defendants.

Statement of the Case.

The petition filed herein seeks to review on Writ of Certiorari the decision of the New Jersey Court of Errors and Appeals reversing orders of the Court of Chancery of New Jersey entered on the advice of Vice-Chancellor Egan under the Soldiers' and Sailors' Civil Relief Act of 1940, Title 50 U. S. C. A. App., Section 501, etc.

On November 29, 1943, a final decree was entered in this

cause (p. 29), directing that a writ of execution be issued to the Sheriff of Bergen County to sell the mortgaged premises which were located in the Borough of Cliffside Park, Bergen County, New Jersey. Pursuant to this decree the premises were sold to complainant and the sale duly confirmed.

On January 30, 1946, Nathan Bloomberg, one of the defendants therein, filed a petition with the Court of Chancery (p. 1), alleging, *inter alia,* that at the time of the entry of the final decree he was in the Military Service; that he was deprived of his rights under the Soldiers' and Sailors' Relief Act of 1940; that no process of subpoena issued to him; that he was greatly prejudiced and injured by said final decree, and had no opportunity of setting up his defenses; that he had no knowledge of the suit against him; that the final decree was procured without due process of law; and that he was deprived of his property without due process of law.

On January 30, 1946, an Order to Show Cause was issued, based on this Petition (p. 9), requiring the complainant, Frank Radich, to show cause why the final decree and, "any other decrees of this Court made in this cause should not be opened, set aside, vacated and for nothing holden, on the ground that the Court was fraudulently induced to make said decree."

A motion was made by complainant to dismiss the petition to reopen (Notice, p. 11), on grounds which are incorporated in the Grounds of Appeal.

This motion was denied by Vice-Chancellor Egan on the ground that the defendant, Nathan Bloomberg, was entitled by virtue of 50 U. S. C. A. App., Sections 525 and 532, to make application to open the decree during the period of his military service or within three months thereafter (Memorandum, p. 13; Order, p. 16). A further order was entered opening the interlocutory and final decrees and granting the defendant, Nathan Bloomberg, 20 days in which to answer the Bill of Complaint herein (p. 18).

ARGUMENT.

POINT I.

No right to open the decrees herein can be based upon the Soldiers' and Sailors' Relief Act of 1940 because petitioner, Nathan Bloomberg, did not comply with the terms of that Act.

The Federal Soldiers' and Sailors' Civil Relief Act provides in Section 520 of Title 50 U. S. C. A. App. as follows:

> "(4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment."

Under this section it must not only appear that the person in military service was prejudiced by reason of his service, but in addition, the judgment may not be opened unless two separate and independent conditions precedent are complied with:

1. The application must be made not later than ninety days after the termination of military service.

2. There must be a showing that defendant has a meritorious or legal defense to the action or some part thereof.

The affidavit of petitioner indicates that he was discharged from the military service on October 30, 1945, or more than ninety days prior to the application to reopen. Similarly, there is complete non-compliance with the second condition precedent through the failure of the petition to contain any semblance of an allegation to show a meritorious or equitable defense to the action or some part thereof. The situation is, therefore, identical with that in *Combs* v. *Combs* (N. C.), 1004 S. E. 656, where the Court considered a section of the 1918 Act which included provisions having the same language as the applicable provisions of the 1940 Act. The Court held:

> "We are of opinion that the motion to set aside the judgment was properly denied.
>
> "(1) First. The defendant failed to make his motion not later than 90 days after the termination of his service in the army.
>
> "(2) Second. It is nowhere made to appear that the defendant has a meritorious or legal defense to the action. In his affidavit the defendant fails to set out that he has any defense to the cause of action as stated in the complaint. While he declares that he has a good and meritorious defense to said action, he fails to set out what that defense is. The statute says that it must be made to appear that the defendant has a meritorious or legal defense. It is not left to the defendant to say that his defense is meritorious or legal, but it must be made to appear so to the judge of the court; for that reason the defendant is required

to set out the facts constituting his defense. Stockton v. Cold Mining Co., 144 N. C. 595, 57 S. E. 335; Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269."

See also *Commercial Credit Corp.* v. *Smith* (Tex.), 187 S. W. 2d 363.

It is submitted that paragraph 3 of section 532 to which Vice-Chancellor Egan referred in his memorandum, when read in connection with the other paragraphs of this section, indicates that it was intended to apply to situations where no final judgment or decree had been entered by a court of competent jurisdiction. In *Keller* v. *Rodie* (Ill.), 61 N. E. 2d 387, the Appellate Court of Illinois held that both sections 2 and 3 of section 532 must be construed together. The Court there said at page 392:

"We think the words 'or otherwise' in sub-section (3) of section 532 relate only to a sale, foreclosure or seizure of the same class as 'under a power of sale, under a judgment entered upon a warrant of attorney to confess judgment contained therein.' This view is borne out by the fact that a sale or seizure under a power of sale or under a judgment by confession may deprive the defendant of his property so seized and sold without any notice to him or any opportunity to make a defense, and the manifest object of this sub-section is to prevent such an occurrence, as demonstrated by the latter part of the same sub-section."

Section 525 of Title 50 U. S. C. A. App. is also cited as authority for the opening of the decree herein. An examination of this section discloses two separate classes of relief. The first dealing with causes of action by or against someone in the military service by tolling the running of the Statute of Limitations; the second, in favor of persons in the military service, by excluding time in the service from the period providing for the redemption of real property sold or forfeited to enforce any obliga-

tion, tax or assessment. It will be noted that both classes deal with limitations of actions and not with the reopening of judgments or decrees. An examination of the decisions construing the Soldiers' and Sailors' Civil Relief Act reveals that the courts have on many occasions referred to Section 520 in connection with applications to reopen judgments or decrees entered after judicial proceedings. *Bell* v. *Niven, et al.* (Ill.), 35 S. E. 2d 182; *Commercial Credit Corp.* v. *Smith* (Tex.), 187 S. W. 2d 363. However, counsel for respondent, despite a diligent search, has not discovered a single case in other jurisdictions where Section 525 has been used as authority for reopening a final decree, such as the foreclosure decree herein. Section 525 was invoked in the case of *Illinois National Bank of Springfield, et al.* v. *Gwinn, et al.* (Ill.), 61 N. E. 2d 249, but only for the purpose of extending during military service a redemption period which existed under the State Statute there considered. This redemption period commenced at the completion of foreclosure proceedings and continued for a period of one year thereafter. No new right of action is created under Section 525, and since there is no right of redemption in New Jersey after final decree of foreclosure, it is submitted that this Section has no application to the issue herein.

POINT II.

The petition of Nathan Bloomberg fails to set forth facts which would justify the exercise of an equitable discretion in reopening and vacating the decree herein.

It seems clear from a reading of the provisions of the Soldiers' and Sailors' Relief Act and the decisions construing these provisions, that the act did not suspend the exercise of judicial power to acquire jurisdiction over, nor grant exemption from civil process to, persons in the military service. *Kurilla* v. *Roth*, 132 N. J. L. 213, 38 A.

2d 862. For these reasons, since the Court had jurisdiction over the petitioner, as an examination of the original papers on file reveals, the issue narrows down to a consideration of the principles of law enunciated by the courts of this State which would be applicable if defendant had not been in military service.

The rule seems settled in New Jersey that after the time limited for taking an appeal has passed, a final decree will not be opened except for fraud or newly discovered evidence. *Fidelity Union Trust Co.* v. *North Jersey Poultry Co.*, 123 N. J. E. 259, 197 A. 65; *Strong* v. *Strong*, 136 N. J. E. 361; *Better Plan Building & Loan Assn.* vs. *Forman*, 124 N. J. E. 561, 3 A. 2d 453; *Miller* v. *McCutcheon*, 117 N. J. E. 123, 175 A. 155.

But the petition to reopen is barren of any factual allegations to support either of these grounds. The unsupported allegation in the Order to Show Cause that the Decree was fraudulently induced is not a substitute for facts. Furthermore, it appears by the defendant's own affidavit that he had knowledge of the suit while it was pending but did nothing about it. Under these circumstances it is submitted that defendant has failed to allege sufficient grounds to justify the Court in exercising its discretion to justify the Court in exercising its discretion to reopen the Final Decree. While the power of the Court of Chancery to open and vacate a final decree on Petition and Order to Show Cause is settled, it is respectfully submitted that the defendant making the application must lay a factual foundation in his petition and supporting proof to justify such relief. The party holding the decree is entitled to know from the outset what case he will be called upon to meet. *In re: Kuser's Estate*, 132 N. J. E. 260, 26 A. 2d 688.

Sound jurisprudence and public policy dictate that applications to reopen decrees should be considered with great caution and should not be granted when the result is injurious to the complainant. *Steinhardt Bros. & Co.* v.

Cohen, 86 N. J. E. 323, 98 A. 637; *Hudson Trust Company* v. *Boyd*, 80 N. J. E. 267, 84 A. 715.

Chief Justice Brogan in *Miller* v. *McCutcheon, supra*, at page 130, stated:

> "It should also be observed that the final judgments of our courts would be seriously jeopardized and property rights stand on very insecure foundations if rehearings and bills of review were entertained to vacate final decrees, when the time to appeal has passed, and others have acquired vested rights, save in the well recognized instances herein mentioned."

See, also, *Wootton* v. *Pollock*, 125 N. J. E. 432, 6 A. 2d 216.

Conclusion.

For the foregoing reasons, respondent respectfully prays that the Writ of Certiorari be denied.

Respectfully submitted,

MILTON T. LASHER,
Attorney for and of Counsel with Respondent, Frank Radich.